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In the Supreme Court of the United States

RAYTHEON CO., *PETITIONER*,

v.

JOEL HERNANDEZ, *RESPONDENT*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, *ET AL.* SUPPORTING RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

The *amici curiae* joining this brief are organizations that represent individuals with disabilities, including those who are rehabilitated drug addicts. The *amici* share a commitment to eradicating the debilitating obstacles faced by persons with disabilities, and to ensuring equality and reasonable accommodation in the workplace and other settings subject to federal disability law. The *amici* have a strong interest in the effective implementation of the Americans with Disabilities Act ("ADA"), and bring a unique understanding of the purpose and role of laws barring disability discrimination. A full recitation of their interest appears in the Appendix.[1]

PROCEDURAL HISTORY AND SUMMARY OF ARGUMENT

On February 24, 2003, this Court granted *certiorari* on the following question proffered by the Petitioner: "Whether the Americans with Disabilities Act confers preferential rehire rights on employees lawfully terminated for misconduct, such as illegal drug use." This broadly phrased question appears drafted to reach several important questions of first impression to this Court, including: (1) the appropriate analysis for reviewing neutral hiring policies that allegedly discriminate by "screening out" a person with a disability; (2) under what circumstances an applicant and rehabilitated drug addict may be entitled to reasonable accommodation; and (3) the relationship between a disability and "misconduct" purportedly caused or compelled by the disability.[2] And, indeed, the briefs submitted on behalf of

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[1] No contributions were made to this brief by counsel for the parties. No monetary contributions were made other than by *amici*. Sup. Ct. R. 37.6.

[2] The question does *not* encompass the question of whether the Respondent is an individual with a disability. The Ninth Circuit ruled

the Petitioner focus upon questions of reasonable accommodation and "misconduct."[3]

In actuality, the facts of this case and its record below cannot withstand the weight of these interesting matters. This case was litigated and decided based upon a garden-variety intentional discrimination theory. The Respondent has not raised a reasonable accommodation claim, and both the trial and appellate courts concluded that the Respondent waived his disparate impact claim. *Hernandez v. Hughes Missile Sys. Co.*, 298 F.3d 1030, 1037 n.20 (9th Cir. 2002); *Hernandez v. Hughes Missile Sys. Co.*, No. CV 98-319 (D. Ariz., Jan. 31, 2001).[4] Further, the Respondent has not argued that his prior "misconduct" should be excused; rather, he has argued that the Petitioner's refusal to re-hire him, years later, was motivated by disability discrimination.

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that as a rehabilitated drug addict, the Respondent is protected under the ADA as a person with a record of or a perceived disability. *Hernandez v. Hughes Missile Sys. Co.*, 298 F.3d 1030, 1035 (9th Cir. 2002). The Petitioner did not seek *certiorari* on the question of disability, and the issue is not before the Court. *See* Sup. Ct. R. 14.1(a).

[3] *See, e.g.*, Brief for Petitioner at 12-13; Brief *Amici Curiae* of the Equal Employment Advisory Council and the Chamber of Commerce of the United States at 5-6.

[4] On this point, the undersigned agree with the United States. Brief for the United States at 17 n.5; *see also Gonzalez v. City of New Braunfels*, 176 F.3d 834, 839 (5th Cir. 1999) ("[A]s Gonzalez failed even to plead a disparate impact claim, the burden never shifted to the department to prove that its qualification requirements for the position of evidence technician are job related and consistent with business necessity."); *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1197-98 (7th Cir. 1997) ("[Plaintiff] has not tried to make a disparate-impact case by presenting evidence that the rating system bears more heavily on the disabled and is not justified by the needs of [defendant's] business. He mentions the point in a sentence in his brief, but neither develops nor substantiates it; it is therefore waived, and we do not consider it."); *F.D.I.C. v. Deglau*, 207 F.3d 153, 169 (3d Cir. 2000) (because appellants "did not raise this issue in their opening brief on appeal, they have therefore waived it, and we will not address it").

Given this procedural posture, the *amici* urge this Court to limit its review to the simple question of whether the Ninth Circuit's determination that triable evidence of intentional discrimination existed was consistent with *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

Consistent with *Reeves*, this Court should affirm the Circuit Court. While the Petitioner argued that its unwritten, purportedly neutral hiring policy provided a legitimate, nondiscriminatory reason for its action, the Ninth Circuit disagreed. The policy at issue, while not expressly mentioning disability, by its terms excluded rehabilitated drug addicts such as the Respondent. Yet such rehabilitated persons, with a past history of disabling addiction, are expressly included within the ADA's protections. 42 U.S.C. § 12114(b). The appellate court properly rejected the asserted defense, as the policy itself acts as a proxy for intentional discrimination against persons protected by the Act. Given the entire record, the Respondent presented sufficient evidence of pretext to survive summary judgment.

It is hazardous for an appellate court to engage in a hypothetical inquiry into all of the theories of discrimination that might have been alleged, developed through discovery, and briefed below.[5] Indeed, this Court has repeatedly stated

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[5] This Court has reconsidered the granting of a petition under comparable circumstances. *See Needelman v. United States*, 362 U.S. 600, 600 (1960) ("After hearing oral argument, and further study of the record, we conclude that the record does not adequately present the questions tendered in the petition."); *McCarthy v. Bruner*, 323 U.S. 673, 674 (1944) (writ of certiorari "dismissed as improvidently granted" where "petitioners' contentions ... are either insubstantial or not properly raised on the record"); *Kimbrough v. United States*, 364 U.S. 661, 661 (1961) (writ of certiorari dismissed where question sought to be reviewed is not presented with "sufficient clarity"); *see also Nike, Inc. v. Kasky*, 2003 U.S. LEXIS 5015, at *17-18 (June 26, 2003) (Stevens, J., concurring) ("The correct answer to such questions [raised by First amendment

that it will not rule on questions in the first instance that were not decided below. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001); *Delta Airlines, Inc., v. August*, 450 U.S. 346, 362 (1981). However, in the event that the Court does consider the application of additional theories of discrimination to this case, the *amici* also submit this brief to aid the Court in its review.

First, contrary to the Petitioner's opening brief at page 11, "discrimination" under the ADA is not limited to employer actions constituting traditional disparate treatment or the failure to make reasonable accommodations. Rather, prohibited discrimination includes using qualification or selection criteria that "screen out or tend to screen out" an individual with a disability, or a class of individuals with disabilities, 42 U.S.C. § 12112(b)(6), or that "have the effect of discrimination on the basis of disability," 42 U.S.C. § 12112(b)(3)(A). *See also* 42 U.S.C. § 12112(a).

Under these provisions, neutral employer policies such as Petitioner's no-rehire policy may be challenged as unnecessarily excluding a person with a disability. Such "disparate impact" or "screen out" claims are particularly important to secure equal employment opportunities for rehabilitated illegal drug addicts. As persons who *by definition* have a history of using unlawful drugs, rehabilitated illegal drug addicts are especially vulnerable to being screened out and adversely affected by facially neutral policies that render them ineligible for employment based on prior violations of company rules or criminal laws.

The Act specifies that an eligibility criterion that excludes a disabled person is permitted only if the employer can demonstrate that it is "job-related and consistent with

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challenge] is more likely to result from the study of a full factual record than from a review of mere unproven allegations in a pleading.").

business necessity." 42 U.S.C. §§ 12112(b)(6), 12113(a). Here, the Petitioner did not undertake to make such a showing. *Hernandez*, 298 F.3d at 1037 n.19. Further, even if the criterion were job-related and necessary, the employer would still be required to determine whether a reasonable accommodation would enable the applicant to fulfill the prerequisite, or whether a less onerous alternative policy would equally serve the employer's need.

Second, under some circumstances reasonable accommodations are required by the statute with respect to disabilities that are not "actual," but are perceived or past disabilities. Here, because of the Respondent's impairment – his rehabilitated drug addiction and the resulting record of a positive drug test at work – he could not overcome the Petitioner's no-rehire policy without the reasonable accommodation of individualized consideration. Petitioner's refusal to consider the Respondent's application may be reviewed as a denial of an employment opportunity to a job applicant based on the employer's need "to make reasonable accommodation to the physical or mental impairments" of the applicant. *See* 42 U.S.C. § 12112(b)(5)(B).

ARGUMENT

I. THE NINTH CIRCUIT'S REMAND OF THIS MATTER WAS CONSISTENT WITH, AND REQUIRED BY, *REEVES*, 530 U.S. 133.

In considering a defendant employer's motion for summary judgment, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. at 150. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 255 (1986)). Accordingly, the reviewing court must "disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 151.

Here, consistent with these standards, the record contains evidence sufficient to create a triable issue of fact with respect to whether Petitioner intentionally discriminated against respondent Joel Hernandez on the basis of his disability in violation of 42 U.S.C. § 12112(a).[6] Upon reviewing this record, the Ninth Circuit concluded that "Hernandez raises a genuine issue of material fact as to

[6] The Petitioner asserts that it was unaware of Respondent's history of drug addiction and rehabilitation at the time that it rejected his application for employment. However, in response to Respondent's charge of discrimination with the Equal Employment Opportunity Commission, Hughes Missile Systems Manager George M. Medina, Sr., on behalf of the Petitioner, described Respondent's history of alcoholism, drug dependence, and related treatment, and stated that his "application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation." Joint Appendix at 17a, 19a; *see also Hernandez*, 298 F.3d at 1033-34. Medina further asserted that the ADA section expressly including rehabilitated drug addicts was not applicable to the Respondent because he "has provided no evidence to demonstrate that he has either successfully completed or is currently undergoing drug rehabilitation." Joint Appendix at 19a n.2. Additionally, the decisionmaker identified by the Petitioner in this matter, Joanne Brockmiller, admittedly had access to Respondent's personnel file and his application which included documents referencing Respondent's history of addiction and current recovery. *Id.* at 14a-15a, 22a, 49a-50a, 52a-56a, 78a; *see also Hernandez*, 298 F.3d at 1034. Similarly, other agents of the Petitioner had information about the Respondent's history of alcoholism, drug dependence, and related treatment. *Id.* at 26a-30a, 89a-92a. The only basis for Respondent's separation was his violation of the alcohol and drug policy. *Id.* at 37a, 71a-73a. Upon concluding its investigation, the EEOC found cause to believe that discrimination had occurred against the Respondent. *Id.* at 93a-95a. While the Petitioner disputes the inferences and conclusions to be drawn from this evidence, triable issues of fact remain, and remand was proper.

whether he was denied re-employment because of his past record of drug addiction." *Hernandez*, 298 F.3d at 1034. Accordingly, the Ninth Circuit's remand of this matter back to the trial court was appropriate and indeed required by this Court's decision in *Reeves*.

To rebut the Respondent's case, the Petitioner cited its unwritten, "word of mouth"[7] company policy not to rehire employees who were terminated or resigned in lieu of discharge due to their violation of the company's code of conduct.[8] In contrast to this unwritten policy, the official written company policy automatically permitted new job applicants who tested positive for drugs or alcohol to re-apply 12 months later with evidence of rehabilitation.[9]

The Ninth Circuit remained unconvinced by the proffered defense, noting that "[m]aintaining a blanket policy against rehire of *all* former employees who violated company policy . . . screens out persons with a record of addiction who

[7] *See* Deposition of George Medina, pp. 23:14-21 (filed with the Ninth Circuit as part of the excerpts of record).

[8] Given the record here – which the appellate court concluded created a triable issue of fact as to whether Respondent was rejected "because of his past record of drug addiction," *Hernandez*, 298 F.3d at 1034 – any nondiscriminatory reason asserted by Petitioner could only be considered as part of a "mixed motive" theory. *See Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2150 (2003) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989), that an employer could "avoid a finding of liability . . . by proving that it would have made the same decision even if it had not allowed gender to play such a role."); *cf. Hernandez*, 298 F.3d at 1035 (citing burden-shifting scheme of *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)).

[9] Joint Appendix at 81a, 83a, 86a-88a. Medina acknowledged that a similar policy for former employees, one permitting them to be considered for employment if they are rehabilitated and pass a drug test, would provide the company with all the information it needed to determine whether a former employee was successfully rehabilitated. Medina depo. 115: 13-24.

have been successfully rehabilitated[.]" *Hernandez*, 298 F.3d at 1036; *see also id.* at 1037 n.19 ("We note that Hughes has not raised a business necessity defense"). Although the panel concluded that the Respondent had waived his disparate impact claims, *id.* at 1037 n.20, the court properly considered the policy's effects, as such evidence is relevant to whether the Respondent has created a triable issue on disparate treatment claim.[10]

Additionally, not all purportedly neutral policies are truly "neutral" for purposes of disparate treatment claims. Some policies, while technically neutral, are actually discriminatory because they regulate or treat adversely a characteristic that is a proxy for a protected classification. In *McWright v. Alexander*, the Seventh Circuit analyzed another facially neutral policy challenged as part of a disparate

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[10] *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973) ("Other evidence that may be relevant to any showing of pretext includes... petitioner's general policy and practice with respect to [employment of members of the protected class]."); *Keathley v. Ameritech Corp.*, 187 F.3d 915, 923-24 (8th Cir. 1999) (pattern of replacement of older salespeople, with other evidence, permitted inference of intentional age discrimination); *McMillan v. Mass. S.P.C.A.*, 140 F.3d 288, 303 (1st Cir. 1998) (statistical evidence regarding pay disparities properly considered by jury as evidence of disparate treatment); *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 163-64 (2d Cir. 1998) (termination of six other road sales representatives over fifty properly considered by jury as evidence of intentional discrimination); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1059 (8th Cir. 1995) (analysis of racial makeup of workforce properly considered by jury as evidence of pretext and intentional race discrimination); *Greene v. Safeway Stores*, 98 F.3d 554, 561 (10th Cir. 1996) (pattern of removals of older employees created triable issue of fact on plaintiff's disparate treatment claim, requiring reversal of trial court's granting of summary judgment in favor of employer); *Eskra v. Provident Life & Accident Ins. Co.*, 125 F.3d 1406, 1412-13 (11th Cir. 1997) (expert testimony on pattern of adversely affected older managers considered as part of evidence creating triable issue on pretext).

treatment claim, and ruled that "an employer cannot be permitted to use a technically neutral classification as a proxy to evade the prohibition of intentional discrimination." 982 F.2d 222, 228 (7th Cir. 1992); *see also id.* at 228 ("[T]he distinction between disparate treatment and disparate impact becomes fuzzy at the border, and [the plaintiff asserting disparate treatment] might conceivably be able to show that this is one of those 'proxy' situations where a case may be made for 'constructive' disparate treatment, if not actual disparate treatment."); *cf. Hazen Paper v. Biggins*, 507 U.S. 604, 613 (1993) ("Pension status may be a proxy for age [in an ADEA case]... in the sense the employer may suppose a correlation between the two factors and act accordingly.").

A. Purportedly Neutral Rules Excluding Rehabilitated Drug Addicts Must Be Closely Scrutinized to Determine Whether They Intentionally Discriminate.

Close scrutiny is particularly important in the context of policies that exclude rehabilitated drug addicts, as there are many "neutral" characteristics that function as proxies for past illegal drug addiction. For example, a rule that an employer will not hire anyone who has ever violated any drug law, who has ever possessed illegal drugs, or who has ever illegally used drugs, does not reference disability or drug addiction, but excludes 100 percent of rehabilitated drug addicts.[11] At the same time, Congress chose after a long and careful debate to explicitly retain protection for rehabilitated drug addicts:

(a) For purposes of this title, the term "qualified

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[11] In this regard, the undersigned *amici* disagree with the United States' analysis. *See* Brief for the United States at 15-16. Such policies directly target proxies which cannot be deemed analytically distinct from the protected trait of rehabilitated drug addiction.

> individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.
>
> (b) Rules of Construction – Nothing in subsection (a) shall be construed to exclude as a qualified individual with a disability an individual who . . . has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use or drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use[.]

42 U.S.C. § 12114(a)-(b)(1).[12]

The Act's sponsors cited the importance of granting equal opportunities to individuals who have successfully recovered from addiction as well the nation's interest in promoting rehabilitation:

> Treatment can save the lives of individual abusers, and it can also return them to productive roles in society which strengthens our families, our communities, our economy, and our ability to meet

[12] Because a record of disability, or a perceived disability, ordinarily relates back to a covered disability, *see* 42 U.S.C. § 12102(2), special text had to be added to ensure coverage for persons with past or perceived drug addiction: "[U]nder the standard Rehabilitation Act analysis, an individual with a past or perceived disability is protected only if the actual physical or mental condition at issue is itself a disability. Because the condition of current drug use is no longer a disability for purposes of this Act, it is necessary to state that nothing in the exclusion of illegal drug use . . . shall be construed to mean that persons with past or perceived illegal drug dependence conditions are necessarily denied coverage under the Act." House Comm. on Education and Labor, H.R. Rep. No. 485 (II), 101st Cong., 2d Sess., at 77 (1990).

> the competitive challenges of the growing international marketplace. By providing protections against discrimination for recovered substance abusers and those in treatment or recovery who are no longer engaged in illegal drug use, the bill provides an incentive for treatment. Under this bill, no one who seeks treatment and overcomes a drug abuse problem need fear discrimination because of past drug use. 136 Cong. Rec. H2443-H2444 (May 17, 1990) (Statement of Rep. Rangel).

Retaining these protections for persons who formerly used or were addicted to illegal drugs, but who have successfully been rehabilitated and no longer use illegal drugs, is an absolutely essential component of our national war against drugs. It also helps to carry out our national commitment to encourage all those who need it to come forward for treatment, and to ensure that individuals who have successfully overcome drug problems will not face senseless or irrational barriers that work to impede their full reintegration into society. 135 Cong. Rec. S 10775 (Sept. 7, 1989) (Statement of Sen. Kennedy).[13]

Plainly, rehabilitated drug addicts who are seeking to rejoin society as productive, contributing members cannot do so if they are barred from opportunities based on their past drug use – the very history that renders them protected by the Act.

In the context of a school teacher with a record of tuberculosis, this Court has held that "the contagious effects of a disease [cannot] be meaningfully distinguished from the

[13] *See also* H.R. Rep. No. 485(II) at 77 ("In removing protection for persons who currently use illegal drugs, the Committee does not intend to affect coverage for individuals who have a past drug problem or are erroneously perceived as having a current drug problem.").

disease's physical effects on a claimant." *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 282 (1987).[14] Here, the effects of the Respondent's disability – his prior drug use – cannot be meaningfully distinguished from his rehabilitated drug addiction.[15] There is an undeniable equivalence between the status of being a rehabilitated drug addict, and the past "conduct" of using illegal drugs.

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[14] *See also E.E.O.C. v. Amego, Inc.*, 110 F.3d 135, 149 (1st Cir. 1997) (distinguishing between conduct compelled by disability and conduct too attenuated to be protected); *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1086-87 (10th Cir. 1997) (rejecting "sharp dichotomy" between disability and disability-caused conduct, with the exception of employer actions encompassed by § 12114(c)(4)); *Teahan v. Metro North Commuter R.R. Co.*, 951 F.2d 511, 516-17 (2d Cir. 1991) (employer cannot avoid discrimination claim by basing termination on conduct o circumstance that is a manifestation or symptomatic of disability).

[15] The Petitioner attempts to distinguish between the Respondent's status of being a rehabilitated drug addict and his past "action" of showing up to work with illegal drugs in his system. A person with a history of being an employed illegal drug addict – a person who repeatedly uses illegal drugs in an addictive manner while holding down a job – is nearly certainly a person with a history of being at work with illegal drugs in his or her body. This is both common sense as well as medical science. *See* Edward J. Cone, "New Developments in Biological Measures of Drug Prevalence," published in Lana Harrison, Ph.D and Arthur Hughes, M.D., eds., Research Monograph No. 167, *The Validity of Self-Reported Drug Use: Improving the Accuracy of Survey Estimates* (National Institute on Drug Abuse, 1997), at p. 114 (urinalyis can detect cocaine and heroin during period of 1 to 3 days after use, marijuana during period of 1 to 3 days after use for casual use and up to 30 days for chronic use, amphetamines during period of 2 to 4 days after use, and barbituates for period of 2 to 4 days for short acting and up to 30 days for long acting), p. 118 (saliva testing can detect very recent drug use), p. 119 (sweat patch can detect drugs for up to 4 weeks after use, and hair testing can detect drugs for months after use); *see also* House Comm. on Conference, H.R. Rep. No. 596, 101st Cong., 2d Sess (1990), at 87 (the provision excluding individuals engaging in the illegal use of drugs "is intended to apply to a person whose illegal use of drugs occurred recently enough to justify a reasonable belief that a person's drug use is current.").

An employer policy that penalizes a rehabilitated drug addict for past illegal drug use is inconsistent with the plain language and underlying policies of section 104. Accordingly, the Ninth Circuit held that "Hughes's unwritten policy that it will not rehire employees who left the company due to violations of personal conduct rules violates the ADA, as applied to employees with the disability of drug addiction whose only work-related offense was testing positive for drug use but are now rehabilitated." *Hernandez*, 298 F.3d at 1037.[16]

B. Congress Provided Employers With Ample Discretion to Protect Against the Effects of Current Drug Use.

Scrutiny of the Petitioner's no-rehire policy is further warranted because Congress granted employers all necessary discretion to protect against the effects of *current* illegal drug use. Outlined in explicit detail, this discretion includes:

> excluding employees and applicants who are "currently engaging in the illegal use of drugs," 42 U.S.C. § 12114(a);
>
> permitting employers to adopt "reasonable policies or procedures, including but not limited to drug testing, designed to ensure that [a rehabilitated drug addict] is no longer engaging in the illegal use of drugs," 42 U.S.C. § 12114(b);
>
> permitting employers to prohibit the use of illegal drugs in the workplace, 42 U.S.C. § 12114(c)(1), (2);

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[16] The Court may find the appellate panel's determination premature, given disputed questions of fact, or unwarranted given the Respondent's litigation choices below. This determination, however, is not essential to the proper remand of this claim under *Reeves*.

permitting employers to "hold an employee who engages in the illegal use of drugs . . . to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use . . . of such employee," 42 U.S.C. § 12114(c)(4);

permitting employers to require that employees comply with the Drug-Free Workplace Act of 1988, 41 U.S.C. § 701 *et. seq.*, as well as any applicable regulations or standards of the Department of Defense, the Nuclear Regulatory Commission, and the Department of Transportation, 42 U.S.C. § 12114(c)(3), (5); and

exempting drug testing from the Act's rules limiting medical examinations, 42 U.S.C. § 12114(d).

Here, the Petitioner sought an additional exemption, one *not* listed in section 104, for a hiring criterion which essentially excluded a rehabilitated drug addict on the basis of his past use of illegal drugs. Permitting such a policy to defeat, on summary judgment, the Respondent's claim of intentional discrimination would be inconsistent with the text and underlying purposes of Congress's carefully drafted compromise on illegal drug addiction.

In light of the entire record, including the inevitable impact of the Petitioner's policy, the Court of Appeals correctly concluded that the unwritten rule was insufficient to support the granting of summary judgment in favor of the Petitioner on the question of intentional discrimination.

II. THE ADA PERMITS NEUTRAL POLICIES, SUCH AS THE PETITIONER'S ASSERTED NO-REHIRE POLICY, TO BE CHALLENGED AS QUALIFICATION STANDARDS OR SELECTION CRITERIA THAT SCREEN OUT OR TEND TO SCREEN OUT AN INDIVIDUAL WITH A DISABILITY OR A CLASS OF INDIVIDUALS WITH DISABILITIES.

Section 102(b)(6) of the ADA defines disability discrimination to include the use of "qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, unless the standard" is "job-related for the position in question and is consistent with business necessity." 42 U.S.C. § 12112(b)(6). Section 102(b)(3)(A) similarly prohibits the use of criteria that "have the effect of discrimination on the basis of disability." 42 U.S.C. § 12112(b)(3)(A).[17]

This rule is based upon regulations promulgated under Section 504 of the Rehabilitation Act:

> A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) The test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown ... to be available.

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[17] In addition, the ADA's general prohibition on discrimination, 42 U.S.C. § 12112(a), includes a prohibition on disparate impact if interpreted as this Court has construed analogous civil rights provisions. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

45 C.F.R. § 84.13(a); *see also* Senate Comm. on Labor and Human Resources, S. Rep. No. 116, 101st Cong., 1st Sess. 38 (1989); House Comm. on Educ. and Labor, H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 72 (1990); and House Comm. on the Judiciary, H.R. Rep. No. 485(III), 101st Cong., 2d Sess. 42 (1990) (all referencing 45 C.F.R. § 84.13). The purpose of the rule is "to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job." 29 C.F.R. pt. 1630, app. § 1630.10.

The Petitioner's no-rehire rule fits easily within the range of selection criteria that may be reviewed under section 102(b)(6). The provision "appl[ies] to all selection standards and procedures, including, but not limited to: education and work experience requirements; physical and mental requirements; safety requirements; . . . interview questions; and rating systems." EEOC, *Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disability Act* § 4.1 (1992); *see also* 29 C.F.R. § 1630.2(q) ("Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.").

Courts have reviewed a wide variety of facially neutral practices under the ADA's "screen out" standard. *See, e.g., Cripe v. City of San Jose*, 261 F.3d 877, 889-90 (9th Cir. 2001) (officer transfer policy requiring beat-patrol service as a "qualification standard" for securing special assignment screened out disabled officers who could not perform beat duties); *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 699 (7th Cir. 1998) ("In our view, the separate criterion of 'physical fitness' – unrelated to job requirements – as a qualification standard for promotions,

layoffs and recalls tends to screen out, whether intentionally or unintentionally, disabled employees."); *McWright v. Alexander* 982 F.2d 222, 229 (7th Cir. 1992) (employee challenging neutral leave of absence rules created triable issue of fact under disparate impact theory); *cf. Matthews v. Commonwealth*, 128 F.3d 1194, 1195-96, 1197 (7th Cir. 1997).[18] Notably, in *E.E.O.C. v. Exxon*, the Fifth Circuit ruled that §§ 12112(b)(6) and 12113(a) provide relevant standards for reviewing an employer's policy of removing from certain jobs employees who had received substance abuse treatment. 203 F.3d 871, 872, 873 (5th Cir. 2000).

The type of discrimination described by section 102(b)(6) is similar to Title VII's "disparate impact" theory, first articulated by this Court in in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *See Gonzalez v. City of New Braunfels*, 176 F.3d 834, 839 n.26 (5th Cir. 1999) ("Recognized as an actionable form of discrimination under Title VII, the disparate impact theory has been adopted entirely by the ADA."). In *Griggs*, this Court explained that Congress was concerned with the "*consequences* of employment practices, not simply the motivation." 401 U.S. at 432 (emphasis in original). Courts have repeatedly relied upon disparate impact theory to review challenges brought under Title VII to selection criteria comparable to Petitioner's no-rehire policy.[19]

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[18] Cases decided under the Rehabilitation Act are consistent. *See Stutts v. Freeman*, 694 F.2d 666, 669-70 (11th Cir. 1983) (written test for training program screened out applicant with dyslexia); *Prewitt v. U.S.P.S.*, 662 F.2d 292, 309-10 (5th Cir. 1981) (disabled veteran created triable issue of fact as to whether physical fitness test screened him out without being sufficiently job-related). The legislative history of the ADA endorses *Stutts* and *Prewitt*. S. Rep No. 116 at 38 (discussing *Stutts*); H.R. Rep No. 485(II) at 71-72 (same); H.R. Rep No. 485(III) at 42 (discussing *Prewitt*).

[19] *See, e.g., Gregory v. Litton Sys.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (race-neutral policy of disqualifying persons with history of

Contrary to the Petitioner's suggestion, nothing in section 104(c)(4) prohibits a "screen out" challenge to its neutral hiring rule. That provision allows an employer to "hold an employee *who engages* in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee[.]" 42 U.S.C. § 12114(c)(4) (emphasis added).[20] Here, the no-rehire rule was applied to a rehabilitated individual – *who was no longer engaging* in the

multiple arrests discriminated against black applicants), *modified as to remedy and aff'd*, 472 F.2d 631 (9th Cir. 1972); *United States v. Chicago*, 385 F. Supp. 543, 549-50 (N.D. Ill. 1974) (policy of disqualifying applicants for police positions based on arrests, negative employment record, and other factors discovered through "background investigation" discriminated against black applicants), *aff'd in relevant part*, 549 F.2d 415, 432 (7th Cir. 1977); *Reynolds v. Sheet Metal Workers Local 102*, 498 F. Supp. 952, 960 (D.D.C. 1980) (arrest record inquiry adversely affected black applicants), *aff'd*, 702 F.2d 221 (D.C. Cir. 1981); *Carter v. Gallagher*, 452 F.2d 315, 326 (8th Cir. 1971) (affirming injunction barring consideration of arrest records of firefighter applicants, and directing trial court to ensure that any consideration of conviction records is tailored to the applicant's fitness); *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1298-99 (8th Cir. 1975) (policy of rejecting persons convicted of any crime other than minor traffic offense discriminated against minority applicants); *Johnson v. Pike Corp. of Am.*, 332 F. Supp. 490, 494-95 (C.D. Cal. 1971) (policy of discharging employees whose wages had been garnished discriminated against racial minorities); *Wallace v. Debron Corp.*, 494 F.2d 674, 676-77 (8th Cir. 1974) (policy of automatically discharging employees with more than one wage garnishment in twelve months imposed disparate impact, and must be justified by employer on remand); *cf. New York City Transit Auth. v. Beazer*, 440 U.S. 568, 584 (1979) (weak statistical showing failed to demonstrate *prima facie* case of disparate racial impact).

[20] This provision was designed to prevent, for example, a drug addict from challenging a termination for using drugs or testing positive in the workplace, or for failing to meet rules and standards while under the influence. Here, Respondent does not challenge his original separation.

illegal drug use. Section 104(c)(4) affords Petitioner no defense; rather, that section plainly leaves such policies open to the challenge that they screen out rehabilitated addicts.[21]

A. Rehabilitated Illegal Drug Addicts Such as Joel Hernandez – Who Are Explicitly Included By The Act's Provisions – Are Especially Vulnerable To Being Adversely Affected Or Screened Out By Policies Such As The One Challenged Here.

Consistent with the plain language of section 102(b)(6) – which refers to the screening out of "an individual with a disability" *or* "a class of individuals with disabilities" – a (b)(6) claim does not require a showing that an entire class of disabled persons are similarly adversely affected. "[U]nder the ADA the standard may be applied to an *individual* who is screened out by a selection procedures because of a disability, as well as to a class of persons." EEOC Technical Assistance Manual at § 4.3 (emphasis in original); *see also Gonzalez v. City of New Braunfels*, 176

[21] Contrary to the Petitioner's assertions of boundless claims by persons "blaming" their disabilities for any prior misconduct, section 102(b)(6) claimants must demonstrate a nexus between their disability and the policy's impact: The challenged qualification standard must "screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, *on the basis of disability* . . . ." 29 C.F.R. § 1630.10 (emphasis added). In its section-by-section analysis, the EEOC explained that the Commission added the phrase "on the basis of disability" to clarify that "there must be a nexus between the exclusion and the disability." 56 Fed. Reg. 35,726, 35,731 (July 26, 1991). Accordingly, "[a] selection criterion that screens out an individual with a disability for reasons that are not related to the disability does not violate this section." *Id.* Additionally, even where the criteria does screen out for reasons related to disability, the criteria will not violate the Act if it is job-related and necessary. Here, the Respondent's past positive drug test is directly related to the disability of rehabilitated drug addiction, and the Petitioner failed to show job-relatedness and necessity.

F.3d 834, 839 (5th Cir. 1999) ("In the ADA context, a plaintiff may satisfy the second prong of his prima facie case [establishing a disparate impact] by demonstrating a adverse impact on himself rather than on an entire group.").

Accordingly, a broad range of evidence may be proffered to demonstrate that the challenged practice in fact functions to screen out the individual plaintiff on the basis of disability. A formal statistical showing is not required.[22]

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[22] As the EEOC explained: "It is not necessary to make statistical comparisons between a group of people with disabilities and people who are not disabled to show that a person with a disability is screened out by a selection standard. Disabilities vary so much that it is difficult, if not impossible to make general determinations about the effect of various standards, criteria and procedures on 'people with disabilities.' Often, there may be little or no statistical data to measure the impact of a procedure on any 'class' of people with a particular disability compared to people without disabilities." EEOC Technical Assistance Manual at § 4.3. The Appendix to 45 C.F.R. § 84.13 – the original Section 504 regulation upon which section 102(b)(6) is based – is in accord: "Revised § 84.13(a) prohibits employers from using test or other selection criteria that screen out or tend to screen out handicapped persons unless the test or criterion is shown to be job-related and alternative tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available. . . . Under the proposed section, a statistical showing of adverse impact on handicapped persons was required to trigger an employer's obligation to show that employment criteria and qualifications relating to handicap were necessary. This requirement was changed because the small number of handicapped persons taking tests would make statistical showings of 'disproportionate, adverse effect' difficult and burdensome. Under the altered, more workable provision, once it is shown that an employment test substantially limits the opportunities of handicapped persons, the employer must show the test to be job-related." 45 C.F.R. pt. 84, app. A. The appendix to the Section 504 regulations was cited as authority by this Court in *Arline*, 480 U.S. at 280 n.5. Additionally, the ADA adopts as a floor the Rehabilitation Act's standards. 42 U.S.C. § 12201(a) ("Except as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under [the Rehabilitation Act] or the regulations issued by Federal agencies pursuant to such title.") (citation omitted).

While relevant evidence may include statistics, it may also include the experience of the plaintiff, expert and non-expert testimony about disabilities and their effects, and even common sense regarding the inevitable impact of particular neutral policies on persons with certain types of disabilities. Here, Respondent Hernandez's own uncontroverted testimony demonstrates that he was individually and inevitably screened out on the basis of disability by the Petitioner's inflexible qualification standards: his history of drug addiction was equivalent to, and compelled, the use of illegal drugs in the past, along with the corresponding positive drug test at work.

Additionally, a large body of data supports the somewhat obvious conclusion that rehabilitated illegal drug addicts are more likely to have personal histories of arrests, convictions, and job loss.[23] *Cf. New York City Transit Auth. v. Beazer*, 440 U.S. 568, 602-603 (1979) (critiquing statistics regarding percentages of black and Hispanic persons in public methadone programs, where figure revealed little

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[23] For example, in a large-scale study surveying more than 10,000 drug abusers admitted to approximately 96 drug treatment programs in 11 cities, nearly 58 percent had been arrested or sent to juvenile court for possession of drugs, a liquor law violation, or "drunk and disorderly." National Institute on Drug Abuse, *Drug Abuse Treatment Outcome Study (DATOS), 1991-1994* (Apr. 2000), intake 1 at 251 (response AG7_1), *at* http://www.icpsr.umich.edu/SDA12/SAMHDA/datos/codebook/22580036.htm. More than 80 percent had spent time in jail, prison, or a juvenile detention home; the top reason for detention was the use or possession of marijuana or other narcotics. *Id.* at 271, 272 (response AG 14 and AG15), *at* http://www.icpsr.umich.edu/SDA12/SAMHDA/datos/codebook/22588039.htm. Nearly 40 percent had had recent trouble getting or keeping a job due to drug or alcohol use, *id.* at 321 (response AH22), *at* http://www.icpsr.umich.edu/SDA12/SAMHDA/datos/codebook/22580046.htm, and a large proportion recently were out of work, *id.* at 319 (response AH19A), *at* http://www.icpsr.umich.edu/SDA12/SAMHDA/datos/codebook/22580046.htm.

about the racial composition of transit authority applicants and employees, and gave no information about participants in private programs); *but see id.* at 603 n. 29 (citing and quoting *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) ("a statistical showing of disproportionate impact [need not] always be based on an analysis of actual applicants")); *Dothard*, 433 U.S. at 330 ("reliance on general population data was not misplaced" where there was no reason to believe that characteristics of population at issue differed from national population).

When an addict such as Respondent becomes successfully rehabilitated, over time his or her personal history of any drug-related arrest, conviction, detention, or job loss fades into the past. However, even years into a successful recovery, that same individual remains vulnerable to being screened out by facially neutral employer policies, such as the one here, that automatically disqualify applicants based on such historical criteria. In a recent survey, 48 percent of California employers stated that they would never hire anyone with a felony drug conviction.[24] Given the ADA's plain language, this group of disabled persons must be permitted to challenge unnecessary neutral policies that prevent them from securing employment.

B. To Comply With The ADA, Such Policies Must Be Job-Related And Consistent With Business Necessity.

The ADA permits a selection criterion that "screens out or tends to screen out" an individual with a disability only if it "is shown to be job-related for the position in question and is consistent with business necessity." 42

[24] Employers Group, *Employment of Ex-Offenders: A Survey of Employers' Policies and Practices* 6 (Apr. 12, 2002), *at* http://www.sfworks.org/docs/Employer%20survey%20report.pdf.

U.S.C. § 12112(b)(6); *see also* 42 U.S.C. § 12113(a) ("It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out of tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity . . .."). "[A]n employer bears the burden of proving that a particular hiring policy is 'job-related' and 'consistent with business necessity.'" *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1184 (6th Cir. 1996).

Business necessity must "not [be] confused with mere expediency." *Bentivegna v. U.S. Dep't of Labor*, 694 F.2d 619, 622 (9th Cir. 1982). To meet the business necessity standard, the challenged practice must not only foster the identified business interest, "but must be essential to that goal." *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1298 (8th Cir. 1975); *see also Morton v. U.P.S.*, 272 F.3d 1249, 1258 (9th Cir. 2001) ("[A]n employer may require disabled employees as well as others to meet an across-the-board qualification standard if it can establish the stringent elements of the business necessity defense."); *Belk v. Southwestern Bell Co.*, 194 F.3d 946, 951 (8th Cir. 1999) ("An employer urging a business necessity defense must validate the test or exam in question for job-relatedness to the specific skills and physical requirements of the sought-after position."); *Griggs v. Duke Power*, 401 U.S. 424, 432 (1971) (in the context of Title VII, "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.").

To evaluate the business necessity of a facially neutral hiring policy such as the one challenged here, courts must examine the relationship, if any, between the disqualifying characteristic and the nature and functions of the particular job. Thus, in *Hendricks-Robinson*, 154 F.3d

685, 699 (7th Cir. 1998), the Seventh Circuit found that a neutral requirement of "physical fitness" was not related to the job requirements of all of the varied jobs at the defendant company. Similarly, in *E.E.O.C. v. Exxon*, the Fifth Circuit noted that the question of whether a general rule of excluding persons who had been treated for substance abuse was necessary to meet the proffered business interest in safety would vary depending upon the particular job, and that courts should therefore consider the potential hazard posed by the position at issue. 203 F.3d 871, 875 (5th Cir. 2000).[25] Notably, while the Petitioner's policy applied to *all* jobs, the policy at issue in *Exxon* applied only to "certain, safety-sensitive, little-supervised positions." 203 F.3d at 872.[26]

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[25] *See also,* EEOC Technical Assistance Manual at § 4.1 ("An employer can fire or refuse to hire a person with a past history of illegal drug use, even if the person no longer uses drugs, in specific occupations, such as law enforcement, when an employer can show that this policy is job-related and consistent with business necessity. . . . However, even in this case, exclusion of a person with a history of illegal drug use might not be justified automatically as a business necessity, if an applicant with such history could demonstrate an extensive period of successful performance as a police officer since the time of drug use.").

[26] Under Title VII, courts have similarly considered the particular job at issue, and any special security or safety concerns, when evaluating business necessity. *See Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1296-97 (8th Cir. 1975) (disqualification for past conviction not required by employer's generalized concerns regarding theft, employee's credibility, and possible employer liability where "no consideration is given to the nature and seriousness of the [past offense] in relation to the job sought"); *Green v. Mo. Pac. R.R. Co.*, 549 F.2d 1158, 1160 (8th Cir. 1977) (affirming injunction permitting consideration of criminal convictions as factor in hiring so long as employer took into account "the nature and gravity of the offense or offenses, the time that [has] passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied"); *Gregory v. Litton Sys.*, 316 F. Supp. 401, 402-03 (C.D. Cal. 1970) (no business necessity where no evidence that persons with particular arrest record "can be expected, when employed, to perform less efficiently or less honestly than other employees"); *Reynolds v. Sheet Metal Workers Local 101*, 498 F. Supp. 252, 973 (D.D.C. 1980) (inquiries about arrest records with adverse impact must be eliminated where not validated as job-related); *Richardson v. Hotel Corp. of America*, 332 F. Supp. 519, 521 (E.D. La. 1971) (noting that past criminal record alone provides no basis for predicting future crime, but upholding policy of excluding persons with serious convictions for security-sensitive positions); *Davis v. City of Dallas*, 777 F.2d 205, 226 (5th Cir. 1985) (upholding employer's policy that police officer applicants not have more than three moving traffic violations in the preceding year, where employer demonstrated that past moving violations are predictor of future accidents, and hiring criteria justified by public safety and interest in safe operation of police cars).

[27] *See also Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 699 (7th Cir. 1998) ("Even when 'physical fitness' is a selection criterion that is related to an essential function of the job, however, it 'may not be used to exclude an individual with a disability *if that individual could satisfy the*

Here, the employer asserts such generalized and non-job-specific concerns as preserving institutional memory, preventing the repetition of prior hiring mistakes, and eliminating "substantial baggage" and other "unnecessary complications" from the workplace. Petitioner's Opening Brief at 27. However, the Petitioner has declined to undertake its required showing that the no-rehire policy is actually essential to those stated interests. *See Hernandez*, 298 F.3d at 1037 n.19 (noting that the employer failed to raise a business necessity defense); *see also Teahan v. Metro-North Commuter R.R. Co.*, 951 F.2d 511, 521 (2d Cir. 1991) ("[A] defendant will bear a heavy burden in attempting to show that freedom from past substance abuse, in and of itself, is an essential job-related requirement"); *Nisperos v. Buck*, 720 F. Supp. 1424, 1428-29 (N.D. Cal. 1989) (plaintiff's use of illegal drugs and related arrest alone did not disqualify him from employment as an INS attorney).

Additionally, even if an employer can demonstrate that the qualification standard is required by business necessity, to prevail it would also have to demonstrate that achieving that standard "cannot be accomplished by reasonable accommodation." 42 U.S.C. § 12113(a).[27]

Further, the plaintiff may yet demonstrate that alternative employment practices exist that satisfy the employer's business needs without causing the same adverse impact. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971). Here, the Petitioner could easily draft and implement a policy that furthers equally its stated business interests without screening out qualified individuals with disabilities.[28] In considering alternative policies that do not exclude rehabilitated drug addicts from employment opportunities, the Petitioner is free to utilize all of the section 104 options, such as drug testing and workplace rules.

III. THE ADA CONTEMPLATES THE PROVISION OF REASONABLE ACCOMMODATIONS TO APPLICANTS WITH PAST AND PERCEIVED DRUG ADDICTIONS.

The Respondent focused upon a disparate treatment theory of discrimination below, and did not brief a reasonable accommodation theory in the trial or appellate courts. Accordingly, this Court should decline to reach the issue of whether the Respondent was entitled to any reasonable accommodation.

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criterion with the provision of a reasonable accommodation.'") (quoting and adding emphasis to 29 C.F.R. pt. 1630, app. § 1630.10); *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1086, 1086 n.8 (10th Cir. 1997) ("A disabled employee may be held to any performance criteria that are job-related and consistent with business necessity, so long as the disabled employee is given the opportunity to meet such performance criteria by reasonable accommodation.").

[28] In fashioning such an alternative policy, an employer need only consider any unnecessary impact on protected individuals – those with a past but rehabilitated, or perceived, disabling drug addiction.

To be clear, however, the ADA contemplates the provision of reasonable accommodations to applicants and employees with rehabilitated drug addiction. Section 102(b)(5)(B) defines discrimination to include the denial of an employment opportunity "based on the need of such covered entity to make reasonable accommodation to the physical or mental impairment of the . . . applicant." 42 U.S.C. § 12112(b)(5)(B). Similarly, section 102(b)(5)(A) states that discrimination includes "not making reasonable accommodations to the known mental and physical limitations of an otherwise qualified individual with a disability . . .." 42 U.S.C. § 12112(b)(5)(A).

Persons who are protected due to their rehabilitated drug addiction have a present impairment.[29] Additionally, such persons have, by definition, past substantial limitations and frequently continue to experience present limitations.[30] These disabled individuals are entitled to seek the modest accommodations they may need to work successfully despite their impairments and limitations. As the EEOC has noted, "[t]he ADA may require consideration of reasonable accommodation for a drug addict who is rehabilitated and *not* using drugs . . .. For example, a modified work schedule, to permit the individual to attend an ongoing self-help program, might be a reasonable accommodation for such an employee." EEOC Technical Assistance at § 8.7; *see also*

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[29] *See* S. Rep. No. 116 at 22 (term "impairment" includes drug addiction); H.R. Rep. No. 485(II), at 51 (same); H.R. Rep. No. 485(III) at 28 (same); 45 C.F.R. pt. 84, app. A (same).

[30] Only one of the three substantive provisions in Title I referencing "reasonable accommodation" – 42 U.S.C. § 12112(b)(5)(A) – requires that the accommodation be made to the "physical or mental limitations" of the individual. *Compare* 42 U.S.C. §§ 12112(b)(5)(B), 12113(a). Further, given the definition of disability as including a *record* of a substantially limiting impairment, 42 U.S.C. § 12102(2)(B), the temporal scope of the "physical or mental limitations" referenced in section 102(b)(5)(A) is not unambiguously limited to the present.

House Comm. on Conference, H.R. Rep. No. 596, 101st Cong., 2d Sess., at 87 (1990) ("many people continue to participate in drug treatment programs long after they have stopped using drugs illegally"). As this Court has recently acknowledged, accommodations may be sought even if they require modifications of an employer's workplace rules.[31]

Several circuits have held that employers are not obligated to provide reasonable accommodations to applicants or employees who do not have "actual" disabilities, but who are protected by the Act due to their perceived disability.[32] Most of these courts acknowledge that the plain language of the statute does not dictate such a result,[33] but nevertheless conclude that accommodating

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[31] *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 398 (2002) ("Many employers will have neutral rules governing the kinds of actions most needed to reasonably accommodate a worker with a disability. . . . [T]he nature of the 'reasonable accommodation' requirement, the statutory examples, and the Act's silence about the exempting effect of neutral rules together convince us that the Act does not create any such automatic exemption [from the obligation to modify neutral rules]."); *see also* 42 U.S.C. § 12111(9)(B) ("The term 'reasonable accommodation' may include . . . modifications of . . . policies").

[32] *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1232-33 (9th Cir. 2003); *Weber v. Strippit, Inc.*, 186 F.3d 907, 916-17 (8th Cir. 1999); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999); *Newberry v. E. Texas State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998); *see also Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 148 n. 12 (3d Cir. 1998) (en banc); *cf. Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996) (allowing "regarded as" plaintiff to proceed); *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 166 (E.D.N.Y. 2002) (concluding that employers have a duty to accommodate in "regarded as" cases).

[33] *See, e.g., Kaplan*, 323 F.3d at 1232 (noting that "on its face" the ADA does not differentiate between the three alternative prongs of the definition of disability with regard to the reasonable accomodation requirements); *Deane*, 142 F.3d at 148 n12 (discussing argument that plain language of statute requires reasonable accommodation for "regarded as" plaintiffs); *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 196 (3d Cir. 1999) (noting that the ADA "does not appear to distinguish

persons without actual disabilities cannot be required, as such a rule would lead to "bizarre results," *Weber v. Strippit, Inc.*, 186 F.3d 907, 916 (8th Cir. 1999).

These Circuit court decisions are incompletely reasoned. First, they fail to appreciate that persons with "record of" or "perceived" disabilities may still have present impairments and/or limitations.[34] Thus, a rehabilitated drug addict may require modest accommodations such as a modified schedule to attend self-help meetings. A person with cancer in remission may require time off for a periodic screening to ensure that the cancer has not returned.

Second, persons with perceived or past disabilities often face obstacles to employment caused *not* by their functional limitations, but by their *status* as persons with disabilities. Thus, a person who is protected due to a history or perception of disability may require modest modifications to overcome these sorts of status-based hurdles. *See, e.g., Jacques v. DiMarzio, Inc.*, 200 F. Supp. at 166-68 (reasonable accommodation may be necessary to enable persons perceived as disabled to overcome prejudice); *Arline*, 480 U.S. at 284 ("Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."). The Respondent's need for an individualized assessment of his application falls

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between disabled and 'regarded as' individuals in requiring accommodation"); *Jacques*, 200 F. Supp. 2d at 166 ("plain language of the ADA" supported conclusion that reasonable accommodations should be available when the plaintiff is "regarded as" disabled).

[34] An individual can be protected by virtue of having a "record of" disability, or by being "regarded as" having a disability, while still experiencing a present impairment or present limitations. *See* 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(k), (*l*).

within this category.[35] Including these accommodations is entirely consistent with the stated purposes of the statute as well as its text.

CONCLUSION

The Court has granted certiorari on a question that has the potential to affect all ADA cases brought under a "screen out" theory of discrimination, as well as all situations in which persons with past or perceived disabilities seek reasonable accommodations to their impairments. At the same time, the Respondent has pursued below a theory of garden-variety disparate treatment, and has waived any disparate impact or reasonable accommodation claims. Given this procedural posture, this Court should focus on whether the Respondent created a triable issue of fact on his claim of intentional discrimination. Before going beyond this narrow question, the *amici* urge this Court to carefully consider the universe of claims that are encompassed by the text of sections 12112(b)(6), 12112(b)(5)(A), and 12112(b)(5)(B), and the underlying purposes of these provisions. The important questions which surely will arise in the context of such claims are not properly or fairly decided here.

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[35] *See PGA Tour v. Martin*, 532 U.S. 661, 688 (2001) ("Petitioner's refusal to consider Martin's personal circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA. . . . To comply with [Title III], an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration."); *Arline*, 480 U.S. at 287 ("To answer this question [whether employee is otherwise qualified] in most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact."); S. Rep. No. 116 at 31 ("fact-specific case-by-case approach to providing reasonable accommodations is generally consistent with interpretations of this phrase under . . . the Rehabilitation Act of 1973"); H.R. Rep. No. 485(II) at 62 (same).

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APPENDIX OF AMICI CURIAE IN SUPPORT OF RESPONDENT

The **American Association of People with Disabilities ("AAPD")** is a national membership organization promoting the political and economic empowerment of children and adults with disabilities in the U.S. Founded on the fifth anniversary of the ADA, AAPD has a strong interest in full enforcement and implementation of the ADA to ensure equal employment opportunities for individuals with disabilities.

The **Association on Higher Education And Disability ("AHEAD")** is a non-profit organization committed to full participation in higher education and equal access to all opportunities for persons with disabilities, including employment. Its membership includes approximately 2,000 institutions (including colleges, universities, not-for-profit service providers, and standardized testing organizations, professionals, and college and graduate students planning to enter the field of disability practice). Many of its members are actively engaged in assuring ADA compliance and in providing reasonable accommodations to both students and employees at institutions of higher education and in high-stakes standardized testing. In addition, AHEAD members actively work with students in establishing vocational plans and job readiness. AHEAD publishes numerous resources on the implementation of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 by post-secondary educational institutions.

The **Bazelon Center for Mental Health Law** is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Bazelon Center has engaged in litigation, administrative advocacy, and public education to promote equal

opportunities for individuals with mental disabilities. Much of the Center's work involves efforts to remedy disability-based discrimination in employment and other areas through enforcement of the ADA.

The **Depression and Bipolar Support Alliance ("DBSA")** is the leading patient-directed national organization focusing on the most prevalent mental illnesses - depression and bipolar disorder. Studies indicate that there may be 20 to 35 million persons with depression and 2.5 million to 10 million people with bipolar disorder. DBSA was founded in 1985 and is based in Chicago. DBSA's mission is to improve the lives of people living with mood disorders. This not-for-profit organization fosters an environment of understanding about the impact and management of these life threatening illnesses by providing up-to-date, scientifically based tools and information, written in easy to understand language. DBSA has more than 1,000 peer-run support groups across the country. Assisted by a Scientific Advisory Board, comprised of the leading researchers and clinicians in the field of mood disorders, DBSA supports research to promote more timely diagnosis, to develop more effective and tolerable treatments and to discover a cure. The organization works to ensure that people living with mood disorders are treated equitably. DBSA's mission firmly embraces increasing the public's awareness that depression and bipolar disorder are widespread and real, treatable medical illnesses. Precisely because these conditions do respond so readily to medications and standard treatments, a patient's employment opportunities should not be prejudiced by his or her pre-treatment inabilities. Accordingly, a no-rehire policy significantly and unfairly penalizes this segment of our society, by inflexibly and illogically barring those with these eminently treatable medical conditions from appropriately resuming legitimate employment. Thus, a failure to uphold the Court of Appeal's decision would needlessly subject millions of otherwise

qualified working Americans to both the specter and the reality of stigmatizing job discrimination today and in the future.

The **Disability Rights Education and Defense Fund, Inc. ("DREDF")**, based in Berkeley, California, is the nation's premier law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979, DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal disability civil rights laws.

The **Epilepsy Foundation®** is the sole national nonprofit health organization dedicated to advancing the interests of the more than two million people with epilepsy and seizure disorders nationwide. People with epilepsy continue to be discriminated against in all aspects of life, particularly employment, because of the stigma associated with the condition and misperceptions of seizure-related behavior. Indeed, people with epilepsy are often terminated or denied employment opportunities because of seizure-related behavior and facially neutral policies such as the one at issue in this case. For example, a person with epilepsy may be terminated because of property damage caused by a seizure and later denied the opportunity to reapply for a job with the same company. The Epilepsy Foundation has, since its inception, sought to end such discrimination through advocacy, education and supporting the development of laws, such as the ADA, that protect individuals from discrimination based on these stereotypes and fears.

The **International Association of Psychosocial Rehabilitation Services ("IAPSRS")** is an international coalition of agencies, practitioners, families, and persons with psychiatric disabilities. The purpose of IAPSRS is to help advance the role, scope, and quality of services designed

to facilitate the community readjustment of people with psychiatric disabilities. IAPSRS seeks to improve the quality of psychosocial rehabilitation services and resources, to strengthen the role of community-oriented psychosocial rehabilitation within the mental health services delivery systems, and to facilitate the coordination and continuity of programs.

The Legal Aid Society – Employment Law Center ("The LAS-ELC") is a public interest law firm that advocates on behalf of the workplace rights of individuals with disabilities and other under-represented communities. Since 1970, the The LAS-ELC has represented clients in cases covering a broad range of employment issues including discrimination on the basis of race, gender, age, disability, pregnancy and national origin. The LAS-ELC represents clients faced with discrimination on the basis on their disabilities, including those with claims brought under the Americans with Disabilities Act. The LAS-ELC also files *amicus* briefs in cases of importance to disabled persons.

The **National Association for the Deaf**, whose members are deaf and hard-of-hearing adults, parents of deaf and hard-of-hearing children, and professionals, works to safeguard the civil rights of deaf and hard-of-hearing Americans.

The **National Association of Protection and Advocacy Systems ("NAPAS")** is the membership organization for the nationwide system of protection and advocacy ("P&A") agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the federal territories, P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities.

NAPAS facilitates coordination of P&A activities and provides training and technical assistance to the P&A network. This case is of particular interest to NAPAS because P&As are committed to challenging discriminatory policies and practices that exclude individuals with disabilities from the workplace.

The **National Council on Independent Living ("NCIL")** is a membership organization that advances the independent living philosophy and advocates for the human rights of, and services for, people with disabilities to further their full integration and participation in society. NCIL was established in 1982 and is the leading national, cross-disability, grassroots organization run by and for people with disabilities.

The **National Employment Lawyers Association ("NELA")** and its 67 state and local affiliates have a membership of more than 3,000 attorneys, and NELA is the country's only professional membership organization made up of attorneys who regularly represent employees in labor, employment, and civil rights disputes. As part of its advocacy efforts, NELA regularly supports precedent setting litigation affecting the rights of individuals in the workplace, and has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the Federal appellate courts regarding the proper interpretation and application of employment discrimination laws. For example, NELA participated as *amicus* in *Clackamas Gastroenterology Associates, P.C. v. Wells,* No. 01-1435 (April 22, 2003), and *University of Alabama at Birmingham, Board of Trustees v. Garrett,* 531 U.S. 356 (2001). NELA members have represented thousands of individuals in this country who are victims of employment discrimination based on disability status, and have brought numerous cases under the Americans with Disabilities Act. As such, NELA has a compelling interest in

ensuring that the goals of the ADA are protected and fully realized.

For over thirty years, the **National Health Law Program ("NHeLP")** has engaged in legal and policy analysis on behalf of low income and working poor people, people with disabilities, the elderly, and children. In its work, NHeLP represents individuals who are experiencing disabling conditions affecting work and the receipt of health insurance benefits. The Program also sponsors research and writing on laws which have been enacted to benefit our client groups. As such, NHeLP has considerable interest in the outcome of this case.

Established in 1909, the **National Mental Health Association ("NMHA")**, with its more than 340 affiliates, is dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, research, and services. NMHA envisions a just, humane and healthy society in which all people are accorded respect, dignity, and the opportunity to achieve their full potential free from stigma and prejudice.

The **National Mental Health Consumers' Self-Help Clearinghouse** is a national technical assistance center established in 1986. It is run by and for people who are consumers of mental health services and survivors of psychiatric illness (known as consumers/survivors). Its mission is to promote consumer/survivor participation in planning, providing and evaluating mental health and community support services, to provide technical assistance and information to consumers/survivors interested in developing self-help services, and advocating to make traditional services more consumer/survivor-oriented. The Clearinghouse has an interest in helping people with mental illness live to their full potential as active members of the community.

The **Western Law Center for Disability Rights ("WLCDR")** is a Los Angeles, California-based non-profit organization that protects and enforces the civil rights of people with mental and physical disabilities. Since 1975, the WLCDR has handled disability rights cases, including numerous employment, housing and access cases under California and federal civil rights laws. The WLCDR provides much needed assistance to persons with disabilities through litigation, mediation, education and meaningful referrals to other agencies.